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NOTES AND COMMENTS

POST-TRIAL QUESTIONING OF DEFECTS IN PLEADINGS.

Under the course of common-law pleading, two distinct post-trial motions were available for use by the parties to call attention to defects in pleadings which were of such nature as to require denying to the successful party the benefits he had acquired by reason of the trial. The first of these motions, technically called the motion in arrest of judgment,¹ was used only by the defendant to call attention to defects in the plaintiff's declaration of such serious nature that they could have been questioned by general demurrer and which had not been cured by verdict.² It necessarily was confined to questioning errors appearing on the face of the common-law record and has been referred to as a belated demurrer.³ A favorable decision upon such motion would necessarily leave the action pending unless plaintiff desired to submit to a judgment in favor of the defendant in order to secure appellate review of the sufficiency of his pleading.⁴

The reverse of that motion, called a motion for judgment *non obstante veredicto*, was available for use solely by the plaintiff to deprive the defendant of a favorable verdict taken on an affirmative defense by way of confession and avoidance when the defensive plea was good in form but not legally sufficient to defeat the admitted cause of action.⁵ In such a case, the verdict would have been taken on an immaterial issue so could not stand, and, as plaintiff's cause of action had been admitted, the court was required to proceed to final judgment on the merits in his favor.⁶

While there has been much criticism expressed over the use of these

¹ *Hitchcock v. Haight*, 7 Ill. (2 Gil.) 604 (1845).

² *Chicago & A. R. Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680 (1898). As to aider by verdict, see *Pearce v. Foot*, 113 Ill. 228 (1885), and *Warren v. Harris*, 7 Ill. (2 Gil.) 307 (1845).

³ *Bond v. Dustin*, 112 U. S. 604, 5 S. Ct. 296, 28 L. Ed. 835 (1884); *Montgomery Bus Lines v. Diehl*, 158 Md. 233, 148 A. 453 (1930). Matter adduced at the trial, although preserved in the bill of exceptions, cannot be used in support of the motion: *Danley v. Hibbard*, 222 Ill. 88, 78 N. E. 39 (1906); *O'Brien v. Chicago City Ry. Co.*, 293 Ill. 140, 127 N. E. 389 (1920). The motion is so like a demurrer that it cannot be used if a general demurrer has been presented and overruled, even if the decision thereon is erroneous: *Chicago & E. I. Ry. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515 (1890).

⁴ The decision on the motion does not amount to a final judgment from which an appeal may be taken: *City of Birmingham v. Andrews*, 222 Ala. 362, 132 So. 877 (1931).

⁵ *Baynes v. Brewster*, 2 Q. B. 375, 114 Eng. Rep. 149 (1841).

⁶ *Lewis v. Clement*, 3 B. & A. 702, 106 Eng. Rep. 817 (1820); *Plunkett v. Detroit Electric Co.*, 140 Mich. 299, 103 N. W. 620 (1905).

motions,⁷ they did serve a desirable purpose so long as there was need for a formal basis in the pleadings to support each judgment. There has been a tendency, however, at least in the American courts, to confuse the two motions so as to permit either party to use either motion against the pleadings of the other,⁸ although there has been due observance of the requirement that, when passing on such a motion, the court may not look into the evidence⁹ and is limited by the state of the common-law record. The Illinois Civil Practice Act appears to have done little to change these fundamental principles for it makes no specific reference to either the motion in arrest of judgment or the motion for judgment *non obstante veredicto*¹⁰ except to provide that if judgment shall be arrested for any defect in the record, the plaintiff need not commence his action anew but that new pleadings shall be ordered to commence with the error which caused the arrest.¹¹

It should be noted, however, that the frequent references in the Civil Practice Act to a motion for judgment notwithstanding the verdict¹² contemplate an entirely different practice than that connected with the use of the common-law motion for judgment *non obstante veredicto*. Although the motion referred to in the Civil Practice Act bears a name which is the English equivalent of the Latin title of the common-law motion, its purpose and function is designed to question not the sufficiency of the pleadings but rather the adequacy of the proof or other issues raised during the trial. Judgment based thereon, while said to be a judgment notwithstanding the verdict, is really such a judgment as would have been granted upon a motion for a directed verdict under the earlier practice. As it is the present view that the trial judge should be allowed to take time to deliberate upon a motion of that nature instead of being forced to a hurried decision

⁷ Shipman, *Common Law Pleading* (West Publishing Co., St. Paul, Minn., 1923), 3d Ed., p. 529, states: "An utter failure to keep in view the proper functions of pleading is strikingly shown when a fair trial on the merits of a case is set at naught by a motion in arrest of judgment, by judgment notwithstanding the verdict, or even on error . . . Such a perversion of justice by the rules of procedure results from the blind and mechanical application of rules for their own sake. Astute practitioners, instead of giving gratuitous instruction to their opponents, often permit them to go through the trial on defective pleadings, and then wipe out all the results of the trial if it goes against them, by motion in arrest of judgment, or a similar motion. Such technicalities cast disrepute on the law."

⁸ *Cruikshank v. St. Paul Fire & Marine Ins. Co.*, 75 Minn. 266, 77 N. W. 958 (1899); *Shives v. Eno Cotton Mills*, 151 N. C. 290, 66 S. E. 141 (1909). See also, *Minor's Institutes*, Vol. 4, p. 856.

⁹ *Comrs. of Fountain Head Drainage Dist. v. Wright*, 228 Ill. 208, 81 N. E. 849 (1907); *Ivanhoe Furnace Corp. v. Crowder*, 110 Va. 387, 66 S. E. 63 (1909); *Trow v. Thomas*, 70 Vt. 580, 41 A. 652 (1898).

¹⁰ The motions referred to in Ill. Rev. Stat. 1945, Ch. 110, § 169, are obviously designed for use as substitutes for the common-law demurrer and are to be presented during the pleading stage rather than as post-trial motions.

¹¹ Ill. Rev. Stat. 1945, Ch. 110, § 180. That section has been carried over from the Practice Act of 1907, see Cahill Ill. Rev. Stat. 1931, Ch. 110, § 80.

¹² See, for example, Ill. Rev. Stat. 1945, Ch. 110, § 192.

in the heat of the trial, the decision thereon is technically one notwithstanding the verdict, for it will be made after the verdict has been received, but really acts in the same way as if verdict had been directed before the issues had been submitted to the jury. Such a motion, therefore, should be confined in its operation to reach defects occurring during the trial stage of the case rather than those found in the common-law record. The choice of terminology may be unfortunate, but should not confuse if attention is given to the fundamental purposes sought to be served.

While the Civil Practice Act is generally silent on the motions under consideration, the much litigated case of *Scott v. Freeport Motor Casualty Company*¹³ throws much light on the modern practice concerning the use of such motions. In that case, plaintiffs had obtained judgment against one Eden for injuries arising from an automobile collision¹⁴ but had failed to obtain satisfaction. They then sued Eden's insurance carrier upon the policy,¹⁵ and were met with the defense that the policy had been forfeited because the insured was using his car at the time of the accident as a salesman for a cattle company in violation of a "special farmer endorsement" contained in the policy. At the first trial, the jury returned a verdict for defendant but plaintiffs' motion for a new trial was allowed. Leave to appeal from the order for a new trial having been granted, the case made its initial appearance in the reviewing courts. The order granting the new trial was reversed but, instead of remanding the cause, the Appellate Court entered judgment on the verdict¹⁶ in the fashion directed by the Civil Practice Act.¹⁷ The case was then taken to the Illinois Supreme Court on writ of error where it was held, on the strength of the decision in *Sprague v. Goodrich*,¹⁸ that the Appellate Court had no right to exercise original jurisdiction by entering judgment on the verdict so its judgment was reversed with directions to remand the case to the trial court.¹⁹

Upon reappearance of the case in the trial court, plaintiffs' motion for new trial was overruled but, before judgment was entered, plaintiffs then moved in arrest of judgment on the ground that defendant's affirmative answer did not set forth a defense which was sufficient to serve as a legal bar to plaintiffs' action. That motion was granted and a repleader was

¹³ 392 Ill. 332, 64 N. E. (2d) 542 (1946), reversing 324 Ill. App. 529, 58 N. E. (2d) 618 (1945). Gunn, J., wrote a dissenting opinion concurred in by Fulton, J. Wilson, J., also dissented.

¹⁴ In that suit, the present defendant had retained counsel to represent Eden: 392 Ill. 332 at 335, 64 N. E. (2d) 542 at 544.

¹⁵ Ill. Rev. Stat. 1945, Ch. 73, § 1000.

¹⁶ 310 Ill. App. 421, 34 N. E. (2d) 879 (1941).

¹⁷ Ill. Rev. Stat. 1945, Ch. 110, § 192(3)(c).

¹⁸ 376 Ill. 80, 32 N. E. (2d) 897 (1941), reversing 304 Ill. App. 556, 26 N. E. (2d) 884 (1940).

¹⁹ 379 Ill. 155, 39 N. E. (2d) 999 (1942).

awarded to commence with defendant's answer. Defendant, having elected to stand by its original answer, defaulted and a second trial was had without defendant's participation leading to a judgment in favor of plaintiffs. On appeal therefrom, the Appellate Court concluded that the answer sufficiently informed the plaintiffs of the nature of the defense relied upon, did present an issue of fact as to whether the policy was in force or not, and that it was error to grant plaintiffs' motion in arrest of judgment.²⁰ Leave to appeal was again granted by the Illinois Supreme Court, where it was finally held, by a vote of four to three, that the action taken by the trial court was proper since the answer did not tender any valid defense by way of avoidance and therefore defendant was not entitled to the benefit of the original verdict in its favor. Judgment for the plaintiff in the trial court upon the admitted cause of action was, as a consequence, finally affirmed.²¹

The case is significant not alone from the fact of the number of times it has been before the reviewing courts but also because of the light it sheds on post-trial procedure. It establishes that but one motion, instead of two, is currently to be used, so that either plaintiff or defendant may move in arrest of judgment to test the sufficiency of the other's pleadings after trial.²² It also serves to reiterate that such motion is confined in scope to examining questions based upon the common-law record²³ and then only to the extent that such errors have not been waived.²⁴ Although the Civil Practice Act purports to abolish all distinctions between the common-law record, the bill of exceptions, and the certificate of evidence,²⁵ that provision was held to be limited in application to determining what is properly before a reviewing court on appeal. The trial court, therefore, on motion in arrest of judgment is still limited to the true common-law record except as it may be supplemented by exhibits attached to the pleadings.²⁶

The principal difference in opinion between the Appellate Court and the Supreme Court, however, seems to lie in the attitude being brought to

²⁰ 324 Ill. App. 529, 58 N. E. (2d) 618 (1945).

²¹ 392 Ill. 332, 64 N. E. (2d) 542 (1946).

²² 392 Ill. 332 at 337, 64 N. E. (2d) 542 at 545. See also cases cited in note 8, ante.

²³ See cases cited in note 3, ante. The court, in the instant case, stated: "It was well established under the former practice that a motion in arrest of judgment was limited to those errors which appeared on the face of the record . . . If the act [Ill. Civil Practice Act] is so construed, the distinction between questions properly raised on a motion in arrest of judgment and those which may be presented on a motion for a new trial will be preserved. Any other construction would lead to confusion as to the questions to be raised by the respective motions." See 392 Ill. 332 at 337-8, 64 N. E. (2d) 542 at 545.

²⁴ Such was the former practice: *Pearce v. Foot*, 113 Ill. 228 (1885), and *Warren v. Harris*, 7 Ill. (2 Gil.) 307 (1845). A continuation thereof can be anticipated for the court in instant case, 392 Ill. 332 at 338, 64 N. E. (2d) 542 at 545, declared: ". . . it must be a defect that cannot be waived."

²⁵ Ill. Rev. Stat. 1945, Ch. 110, § 198(2).

²⁶ *Morris v. Goldthorp*, 390 Ill. 186, 60 N. E. (2d) 857 (1945).

bear upon the sufficiency of the pleadings in the instant case. The "special farmer endorsement" attached to the policy there involved declared that the reduction in premium was granted on condition that the assured "must reside on a farm" and should engage in no occupation "other than farming." It also provided that if the assured changed his occupation or his residence or if the vehicle was used "for any other purpose other than ordinary farm and/or pleasure purposes," the policy was to cease automatically. Defendant's answer admitted all allegations in the complaint except the general allegation that all conditions precedent in the policy had been fully performed. This allegation was specifically denied by pointing out that the "special farmer endorsement" had been violated in that the assured had (a) driven the automobile on a trip for the purpose of selling cattle in his capacity as salesman for a named employer, (b) had taken employment with a named cattle company after the issuance of the policy, and (c) had claimed and received the benefit of the Workmen's Compensation Act against such employer to recover for his injuries sustained in the accidental collision with the car of the plaintiffs. The Appellate Court was of the opinion that these contentions, found to be true by the jury, were sufficient to constitute a defense in bar particularly since the Civil Practice Act provided that no pleading should be deemed bad in substance if it contained sufficient information to reasonably inform the opposite party of the nature of the defense relied upon,²⁷ and further required that all defects in pleadings, whether in form or substance, not objected to in the trial court, were to be regarded as waived.²⁸

The Supreme Court, on the other hand, took a much narrower view on the subject and concluded that, as the "special farmer endorsement" operated in the fashion of a condition subsequent, it was incumbent upon defendant to clearly allege, as well as prove, the existence of such defense. In that respect, the court found that an allegation that the insured had been "employed . . . in the capacity of a salesman" was not, necessarily, the equivalent of the requirement that he should engage "in no occupation other than farming" since it was open to the possibility that the employment as salesman might have been an occasional expedient rather than a change in the main purpose of the insured's business activity, to-wit: farming. In much the same way, it held that the charge that the insured was "driving the automobile on a trip taken for the purpose of selling cattle" for a named cattle company was not the same thing as saying that he was using the car "for any purpose other than ordinary farm and/or pleasure purposes," as an occasional use of that nature was held not to be sufficient to forfeit the policy. The insured's acceptance of benefits under

²⁷ Ill. Rev. Stat. 1945, Ch. 110, § 166(2).

²⁸ *Ibid.*, § 166(3).

the Workmen's Compensation Act was likewise regarded as no defense on the ground that, upon the happening of the accident, the rights of the plaintiffs, as third-party beneficiaries under the insurance contract, became fixed and could not be affected by any subsequent act or omission of the insured.²⁹

While the last of these points cannot well be disputed, it would seem as though the treatment of the other two is unnecessarily strict and represents a return to technical niceties of pleading more in harmony with the ancient practice than the liberalized views inherent in the present procedure. A defendant should establish that a contract has become forfeited by the operation of a condition subsequent,³⁰ but the average individual, reading the defendant's answer, would have no difficulty understanding what the real issues were nor could he be confused as to the basis of the defense. The establishment of any one of the other two contentions would have been sufficient to forfeit the policy and, when the jury returned a verdict for defendant, it could be argued that they found that the insured had made some use of his car other than for "farming and/or pleasure purposes," even if they had found no substantial change in the insured's principal occupation.

There is much merit in the dissenting opinion of Justice Gunn, not alone because it urged that, if there was poor pleading on the part of the defendant, the time to have criticised the same was in the pleading stage,³¹ but also because it calls attention to a statute which has long been designed to save a judgment based on the merits from the accidental errors or omissions which may occur in pleading.³² In accordance with the limitations of that statute, motions in arrest of judgment have heretofore been denied

²⁹ In *Bay v. Williams*, 112 Ill. 91 at 97, 1 N. E. 340 at 342-3 (1884), the court stated: "The principle upon which this court has acted is, that such a promise invests the person for whose use it is made with an immediate interest and right, as though the promise had been made to him. This being true, the person who procures the promise has no legal right to release or discharge the person who made the promise from his liability to the beneficiary. Having the right, it is under the sole control of the person for whose benefit it is made, as much so as if made directly to him."

³⁰ *Mulconery v. Federal Automobile Ins. Assn.*, 230 Ill. App. 236 (1923).

³¹ Ill. Rev. Stat. 1945, Ch. 110, § 166. In a note appended to Section 42 of the Civil Practice Act in McCaskill, Ill. Civ. Prac. Act Anno. (Foundation Press, Chicago, 1933), p. 90, appears the statement: "The parties are entitled to good pleadings in *advance* of trial, but if they are content to try cases upon bad pleadings, or upon no pleading, they should be estopped . . . from insisting that the pleadings were insufficient, so long as the court had jurisdiction of the subject matter. The function of the pleadings is to prepare the case for an orderly trial. After the trial is over, this function has ceased." (Italics added.) See also *Connett v. Winget*, 374 Ill. 531, 30 N. E. (2d) 1 (1940), reversing 303 Ill. App. 227, 25 N. E. (2d) 116 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 189.

³² Ill. Rev. Stat. 1945, Ch. 7, § 2 and § 6. Section 6 thereof provides that: "Judgment shall not be arrested . . . for the want of any allegation or averment on account of which omission a motion raising an objection to such omission in the pleading could have been sustained."

where the defect could be said to have been waived;³³ where the defect did not appear on the face of the record;³⁴ where the cause of action was defectively stated;³⁵ or where the error was merely one of form.³⁶ It is true that such statute has not saved verdicts and judgments where the pleadings were so insufficient as not to state a cause of action or defense,³⁷ or where the verdict did not respond to the issues which had been joined,³⁸ but it does amply evidence an intention that no judgment on the merits should be lightly cast aside.

It would seem, therefore, that if the parties to the instant case were willing to try the issues on imperfect pleadings³⁹ the court should not, by insistence upon ancient technicalities, return our reformed procedure to the days when the art of pleading was an end to itself rather than a means toward the attainment of substantial justice.

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³³ *Comrs. of Fountain Head Drainage Dist. v. Wright*, 228 Ill. 208, 81 N. E. 849 (1907).

³⁴ *Evans v. Lohr*, 3 Ill. (2 Scam.) 511 (1840).

³⁵ *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241 (1894); *Enright v. Gibson*, 119 Ill. App. 411 (1905), affirmed in 219 Ill. 550, 76 N. E. 689 (1906); *Garibaldi & Cuneo v. O'Connor*, 112 Ill. App. 53 (1904), affirmed in 210 Ill. 284, 71 N. E. 379, 66 L. R. A. 73 (1904).

³⁶ *Wallace v. Curtiss*, 36 Ill. 156 (1864).

³⁷ *Hartrich v. Hawes*, 202 Ill. 334, 67 N. E. 13 (1903); *Kipp v. Lichtenstein*, 79 Ill. 358 (1875); *Haynes v. Lucas*, 50 Ill. 436 (1869); *Waxenberg v. J. J. Newberry Co.*, 302 Ill. App. 128, 23 N. E. (2d) 574 (1939); *Western Screw Co. v. Johnson*, 86 Ill. App. 89 (1899).

³⁸ *Miller v. Gable*, 30 Ill. App. 578 (1888).

³⁹ Compare *Ford Motor Co. v. National Bond & Investment Co.*, 294 Ill. App. 585, 14 N. E. (2d) 306 (1938), where the parties proceeded to trial on insufficient pleadings, with *Spence v. Washington Nat. Ins. Co.*, 320 Ill. App. 149, 50 N. E. (2d) 128 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 146, where adequate attack on the insufficient pleadings was made before trial but ruling thereon was deferred until after the hearing of evidence. See also *Connett v. Winget*, 374 Ill. 531, 30 N. E. (2d) 1 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 189.